

VII

Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict

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Introduction

It seems there are two types of international lawyers—those who view apparent legal voids as vacuums to be filled by international law and those who view legal voids as barriers to the operation of international law. Voids, and for that matter ambiguity, provoke different reactions from different international lawyers. How an international lawyer or tribunal regards an apparent legal void may be, to borrow a poker term, one of the great international law “tells.” In addition to providing doctrinal or descriptive clarity, resolutions of voids usually expose a lawyer’s level of confidence in the international legal system as well as his or her outlook on the propriety of sovereignty-based regulation.

Disagreement over the significance of international legal voids is not merely academic. To the contrary, debate over perceived or real legal voids between international law interpretive camps quickly brings questions of abstract legal theory into the practical worlds of international policy and practice. Even the hardened international-rule skeptic must see that States’ conceptions of international law translate almost directly into policy.¹ With respect to the international law of war,

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such interpretations can produce widespread life-or-death consequences and, with the rebirth of international criminal law, severe criminal sanctions.

Legal voids exist and operate nowhere more clearly and widely in international law than in the laws of war applicable to non-international armed conflicts (NIACs), understood classically as civil wars.² In purely quantitative terms, the positive law of NIAC pales in comparison to the law-of-war provisions applicable to conflicts between States.³ For example, the 1949 Geneva Conventions, including their 1977 updates, contain well over five hundred substantive articles applicable to international armed conflict (IAC)⁴ yet fewer than thirty applicable to NIAC. There is thus no small irony in the fact that the modern law of war actually traces its beginning to a document created to regulate conduct in a civil war.⁵ Yet ever since, States have rejected invitations and proposals to level the positive legal gap between IAC and NIAC. The result has been what some regard as glaring legal voids regarding the latter.⁶

Status of government actors in NIAC provides an intriguing and specific example of just such a void. Whereas the protections and obligations of the law of IAC are premised almost entirely on the status of affected persons, the law of NIAC spurns such classifications, as well as the IAC taxonomy of status-based protection generally. International lawyers have long regarded status of persons as largely irrelevant to NIAC.⁷ Yet modern forms of conflict and State responses may soon place pressure on the NIAC status void. Increasing media attention, growing international oversight and progressively heightening sensitivity to the suffering produced by NIAC conspire to match the legal protective regime of NIAC with that of IAC, including perhaps the latter's use of status.

Status in IAC describes a number of circumstances and legal relationships (e.g., wounded, wounded at sea, prisoner-of-war, or civilian status). This chapter focuses on the use of status to determine lawfulness of participation in hostilities, or what is sometimes referred to in IAC as combatant status.⁸ In particular, this chapter explores the extent to which the international law of NIAC regulates the status of persons who participate in hostilities on behalf of the State.

This chapter begins by addressing the descriptive question whether the international law of NIAC speaks to government forces' status at all. An analytical section accompanies, offering explanations of the likely influences behind the state of the law. A predictive effort follows, addressed to the question whether the law is settled or instead likely to change. This section identifies a number of pressures conspiring to fill the NIAC status void. An argument in favor of imposing status-like limitations on government forces in NIAC is derived from the law-of-war principle of distinction, and then rebutted by logical, structural and operational arguments. The chapter concludes by addressing a series of considerations related to the chapter's

opening generalization about international legal voids as an opportunity to reflect more deliberately on an appropriate interpretive approach to the law of NIAC.

The International Legal Status of Government Forces in NIAC

The law of war is riddled with categories—categories of conflicts,⁹ categories of weapons,¹⁰ categories of persons. With respect to persons, the primary byproduct of these categories is an elaborate system of status for individuals participating, or caught up, in armed conflict. Principled application of the law requires a deep understanding of how the law of war employs status.¹¹ Just as the law of war confers status to implement its humanitarian goals, the law's denial of status often produces disappointing or even inhumane results. Frequently, the complexities and nuances of status seem to frustrate alignment of legally correct outcomes with intuitively moral or normatively desirable outcomes. A great many of the present and past errors in the application of the law of war are attributable either to failure to understand how status attaches and operates in armed conflict or simply to unwillingness to accept the practical consequences of correct status determinations.¹²

In war between States, status plays out primarily in the allocation of the protections and obligations of the law of war. Nearly every important protection of the law of IAC requires a predicate determination of the status of persons seeking protection.¹³ A prominent commentator observed with respect to IAC, "Every person in enemy hands must have some status under international law . . . ; nobody in enemy hands can be outside the law."¹⁴ In most cases, protection from intentional targeting requires the status of civilian,¹⁵ that of wounded person¹⁶ or, generally, that of *hors de combat*. Persons qualifying for wounded or civilian status receive protection from attack "unless and for such time as they take direct part in hostilities."¹⁷ To benefit from the most elaborate law-of-war treatment obligations, persons in the hands of an adversary must qualify for wounded and sick,¹⁸ prisoner-of-war¹⁹ or protected-person status.²⁰ The 1949 Geneva Convention on Civilians includes subcategories of civilian, including the "populations of countries in conflict,"²¹ "national[s] of neutral state[s]"²² and "interned protected persons."²³ The law further classifies members of the armed forces into subcategories of combatant and non-combatant.²⁴

In addition to allocating protection, the law of war uses status to deny protection and treatment obligations. Designation as a spy, mercenary, or, somewhat more controversially, an unprivileged belligerent, unlawful combatant, saboteur or guerilla can greatly reduce or alter a person's protection or treatment under the law of war.²⁵ Status has been the focus of not only operational, humanitarian and

academic attention but also some of the most significant criminal litigation to enforce the law of war.²⁶

The law of NIAC, however, stands generally as an exception to law-of-war reliance on status. Whereas the legal regime applicable to IAC is replete with categories of status, no such system or taxonomy operates in the law of NIAC. The traditional response to the question whether international law regulates status in NIAC has been a confident no.²⁷ While Additional Protocol II of 1977, the most developed treaty law applicable in NIAC, speaks in terms of a “civilian population,” it offers neither qualifying criteria nor any definition of the term “civilian.”²⁸ Perhaps more significantly, the Protocol offers no counterpart to civilian status such as the Additional Protocol I status of combatant.²⁹

To the uninitiated, the most noticeable legal void of NIAC might be the absence of prisoner-of-war status. Along with protection of the wounded and sick, prisoner-of-war status has long been one of the consummate law-of-war topics.³⁰ Few of the major law-of-war treaties addressed to the protection of victims of armed conflict have failed to address prisoners of war. While treatment provisions and living conditions of the captured garner the lion’s share of popular attention, the most important aspect of prisoner-of-war protection has been immunity from prosecution for lawful hostile acts—so-called combatant immunity. Combatant immunity protects most prisoners of war from prosecution by their captors for mere participation in hostilities.³¹ Thus, nearly all law-of-war prosecutions of prisoners of war have concerned the manner in which they conducted hostilities rather than the fact of their participation in war or their otherwise lawful, warlike acts.

Fighters³² captured in NIAC do not share the status, immunity or regime of treatment obligations afforded to their IAC counterparts.³³ Despite development of a separate protocol dedicated to developing humanitarian protection in NIAC, the law of war affords no prisoner-of-war status in NIAC.³⁴ States’ desire to avoid attachment of status in NIAC is perhaps apparent in the Additional Protocol II label for the captured, “[p]ersons whose liberty has been restricted.”³⁵ This is a strained label, even by international legal standards; it is likely States wished to avoid any implications of status or legitimacy arising from use of a term of art to describe detention in NIAC. The international law of NIAC affords captured fighters treatment obligations no different from those applicable to the general, non-hostile population.³⁶ Neither efforts to comply with criteria of conduct or appearance nor any offer of reciprocal observance of the law can compel recognition of prisoner-of-war status by a captor during NIAC.³⁷ Instead, opposition fighters captured in NIAC, no matter their appearances or conduct, are likely to be regarded as mere criminals, fully subject to the domestic penal regime of the territorial State.³⁸ The

nearest comment Additional Protocol II offers on the topic of combatant immunity is Article 6(5).³⁹ However, this provision merely charges States to “endeavor” to grant amnesty to fighters. Amnesty is by no means an international legal obligation in NIAC. Domestic law represents the far more relevant legal source for both treatment obligations and immunities if any arising from participation in NIAC. The law of NIAC is nearly silent.

The NIAC status void is even more pronounced with respect to the status of government actors in NIAC. Investigation reveals no treatment in relevant treaty law, nor any significant international custom or usage on the topic. The well-known criteria used to evaluate combatant status in IAC appear nowhere in the positive law of NIAC.⁴⁰ And while some States’ military manuals address NIAC, none of those reviewed acknowledges international legal input to government forces’ status.⁴¹ Instead, most emphasize that the existing law of NIAC has no effect on the legal status of the parties to the conflict.⁴² Finally, there is there no evidence of internationally based prosecutions of government actors for their mere participation in NIAC or based on the nature or composition of such forces.

States thus appear to be free from international regulation of the status or nature of government actors they employ against rebels in NIAC. Although States have created rules regulating the conduct of their forces in NIAC, no positive international rules limit the nature of persons or organizations governments may employ in NIAC. Nor does the law of NIAC provide any general status for such forces. In fact, government forces’ status in NIAC generally can be said to constitute one of the remaining voids of the international laws of war. Three explanations for this void seem apparent: one practical, a second probable and a third speculative but possible.

The most practical explanation may be that there has simply been little need. Government actors involved in NIAC have not looked to international law for the legitimacy of their participation or for their legal mandate to carry out acts that are essentially internal or non-international in character. Actions taken to defend the State from internal threats lie at the heart of sovereignty. Even the highly internationalized collective security system of the United Nations includes a barrier to outside intervention in internal conflicts.⁴³ The nature and status of government forces used in NIAC has been an area dominated by municipal law. Responses to insurgency or rebellion, though typically of greater intensity than routine crime, remain essentially law enforcement operations.⁴⁴

There are lively debates concerning domestic legal status and participation in hostilities—none more timely and relevant than the U.S. Title 10–Title 50 division of national security authority.⁴⁵ Conceptions of U.S. domestic law might well restrict authority to engage in combat to the armed forces as organized under Title 10

of the United States Code. Although likely envisioned in extraterritorial contexts, debate also swirls around permissible roles for private security contractors (PSCs) in armed conflict. Episodes such as the Blackwater Nisoor Square shootings⁴⁶ and other examples of excessive use of force by PSCs have fostered efforts to restrain them from direct participation in hostilities.⁴⁷ Proposals to limit PSC activities appear to have gained momentum, notwithstanding the considerable economies that have developed around that corner of the military-industrial complex. Clearly, States may resort to domestic law to limit the activities of their agents in armed conflict. The question remains apart, however, from whether they have resorted or will resort to international law to do the same.

To be certain, government actors may very well find themselves called to task for the international legality of specific conduct and means and methods used in combat.⁴⁸ International criminal tribunals of the late twentieth and early twenty-first centuries have developed the NIAC *jus in bello* through extensive cases. Yet the legality of their mere participation in NIAC itself has not been addressed in any forum applying international law.

A related factor contradicting indications of international legal treatment of status may be that States have tended to use forces practically appropriate to the task, that is, armed forces. When the activities of opposition fighters reach a scale or level of intensity sufficient to cross the threshold from mere banditry or riot into armed conflict, resort by the government to the armed forces of the State becomes an obvious, often necessary response. Indeed, forcing the State to resort to armed forces is often regarded as a condition precedent to classifying a situation as armed conflict in the first place.⁴⁹

By contrast, the prevailing view of the law of IAC seems to limit the types of forces States may employ as direct participants in hostilities while preserving the protections of the combatant class, most obviously prisoner-of-war status.⁵⁰ To expect prisoner-of-war status for their forces upon capture, it is generally agreed that States must employ regular armed forces or their equivalent in direct hostilities.⁵¹ If this view is correct and if one extends it by custom to NIAC then it's likely the case, as the late Louis Henkin might say, that most States are in compliance, most of the time.⁵² Thus the problem, if there is one at all, may frequently be preempted by supposed compliance.

A second, highly probable explanation for why international law does not explicitly regulate status of government actors in NIAC concerns States' general attitudes toward the relationship between international law and NIAC. States have steadfastly resisted creating parity between the law of IAC and that of NIAC. It is likely the absence of international law is simply a byproduct of States' general reluctance to commit to positive rules in NIAC. The reasons for this reluctance are by

now well known. Fear of conferring legitimacy on rebels, concerns over failure of reciprocal observance,⁵³ fear of limiting operational freedom of action and fear of erecting obstacles to domestic prosecutions of persons who take up arms against the State have all driven States to resist expanding the law of NIAC to match that of IAC. States simply do not view opposition fighters in NIAC as legal equals.

Equality of status between sanctioned combatants has long been bedrock of the international law of IAC. Indeed, equality before the law has been a distinguishing feature of the *jus in bello*, setting it apart from its law-of-war counterpart, the *jus ad bellum*. Yet no “equal application” principle operates in the present law of NIAC.⁵⁴ Indeed, States conditioned their consent to what little positive law of NIAC exists on an explicit guarantee that legal status would form no part of the law.⁵⁵ The concluding clause of Common Article 3 of the 1949 Geneva Convention provides, “The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”⁵⁶

The point is made again when one looks to the law of IAC. Even in its current, highly developed state, the law of IAC does not fully regulate the status of government forces. The concept of combatant status has ancient law-of-war roots.⁵⁷ Yet the positive law does not directly address or commit to this area. The Third Geneva Convention does not address combatant status, or immunity for that matter, at all—surprising, perhaps, for a prisoner-of-war convention comprising over 130 articles.

Building on the Third Convention, Additional Protocol I of 1977 states that combatants “have the right to participate directly in hostilities” and is likely reflective of custom. Yet this commitment represents only a partial comment on the issue of combatant status. For instance, the relevant article does not affirmatively indicate whether combatants’ right to participate in hostilities is exclusive. Thus it is unclear whether international law actually proscribes or even regulates participation in hostilities by persons not qualifying as combatants. Most law-of-war experts might posit that the right is exclusive to combatants but the soundest view is that international law is merely silent on the matter of privilege with respect to civilians. The matter is not committed to international law whatsoever. It is left to State prerogative and hence to municipal law. Additional Protocol I, Article 51(3), which merely outlines the targeting consequences of civilian participation, is the most the law of IAC offers on the topic.⁵⁸

Commentary indicates the Additional Protocol I drafters intended to codify and clarify international custom on the point of combatant privilege.⁵⁹ Still, experts debate what exactly that article and the law of IAC do for combatants in terms of authority. Some describe international law of armed conflict (LOAC) as a source of authority to participate in hostilities—a combatant’s privilege.⁶⁰ Others disagree,

characterizing the article as merely immunity—insulation from prosecution—rather than an affirmative grant of authority, a right or permission.⁶¹ The better phrasing may be that the article merely prohibits prosecutions rather than constitutes affirmative authority or positive sanction. Notwithstanding contrary interpretations by the 2009 United States Congress and the mid-twentieth-century U.S. Supreme Court, the majority view is that the law of IAC does not concern itself with the question of criminal consequences for mere direct participation in hostilities.⁶² The best view is that IAC regulates combatant status only as an instrumentality—a means to effecting other ends, such as treatment upon capture or for purposes of contrast with persons protected from attack.

The point for purposes of this chapter is that States' apparent reluctance to commit combatant status fully to international law in IAC makes the prospect that they would do so in NIAC extremely unlikely. Nothing even approaching the partial coverage offered by Additional Protocol I appears in Additional Protocol II. Nor do any of the usual indicators of customary norms, such as military manuals or statements of *opinio juris*, indicate any State commitment of combatant status in NIAC to international law.

A final and possible reason for NIAC's void concerning government actor legal status is lack of consensus. The details of how to treat NIAC have long split the authors of international law.⁶³ Balancing the competing interests of humanity and respect for sovereignty has bogged down nearly every law-of-war treaty diplomatic conference. But this balance has been particularly elusive with respect to NIAC. Both Common Article 3 to the 1949 Conventions and Additional Protocol II proved to be especially contentious on topics as fundamental as the definition of military objective.⁶⁴ Each instrument generated highly divisive factions at its respective diplomatic conference.⁶⁵

For example, the 1949 Geneva Conventions diplomatic conference generated a lengthy report on the scope of NIAC.⁶⁶ Consensus that the Conventions would only operate in conflicts analogous to classic civil war required fifteen weeks of work and twenty-three meetings on NIAC.⁶⁷ Later, at the diplomatic conference that produced the 1977 Additional Protocols, the scope of covered NIAC again proved contentious. Somewhat surprisingly, the majority of delegations appeared more concerned with contracting LOAC rather than expanding it to cover the entire range of NIAC.⁶⁸ These delegations scored a partial victory in the comparatively stingy application provisions of Protocol II. It is generally agreed that Protocol II applies to a narrower class of conflicts than its 1949 counterpart, Common Article 3.⁶⁹ Thus, while there may well be a faction of States who, given the opportunity, would consent to international regulation of government forces' status in NIAC, they seem not to have garnered sufficient support at major treaty conferences.⁷⁰

In the final analysis it is overwhelmingly apparent that States have not made any clear commitment of the issue of government forces' status in NIAC to international law. Considerations including lack of necessity, general reluctance to yield sovereignty over internal affairs and lack of consensus have all contributed to the NIAC legal void. Yet given evolving notions of the formation of international law, including the law of war, the staying power of this void may be in doubt.

Pressures on the Existing NIAC Framework

A host of developments call into question whether government actor status in NIAC will remain unregulated by international law. First, if, as argued above,⁷¹ States have previously evaded international regulation of the status of their forces in NIAC because they have largely conformed to what some regard as limits applicable in IAC, this may not hold true much longer. It seems the threats posed by modern insurgencies and hostile non-State actors are steadily provoking more comprehensive responses from States than previously. Leveraging technology, social media and increasingly open borders, States appear to resort to a broader spectrum of national power to counter today's non-State actors. Modern strategy and tactics feature informational and economic elements of State power almost as prominently as more traditional military and diplomatic elements in countering current threats.⁷²

Although intelligence work has always played an important part in armed conflict, modern NIAC appears to place even greater emphasis on intelligence gathering. Insurgencies and terrorist groups have frustrated many traditional intelligence collection practices by operating as diffuse networks rather than as rigid "command and control" organizations. To counter these adaptations, national intelligence assets outside the Department of Defense appear to provide not just strategic and operational assessments but also tactical-level intelligence used in small-unit engagements. Civilian intelligence assets appear to provide tactical operators detailed, constantly updated information on enemy locations and activities far more analogous to that provided by reconnaissance spotters and scouts than to the templated, prepackaged and static information previously provided.⁷³

The involvement of intelligence community actors in the recent operation against Osama bin Laden provoked not only questions concerning the lawfulness of the operation but interest in the status of the various actors and agencies involved. Reports indicate that in addition to special operations members, Central Intelligence Agency personnel were deeply involved in preparations for and conduct of the raid.⁷⁴ Defending the operation on *PBS Newshour*, the Director of the Central Intelligence Agency explained the mission as a so-called "title 50"

operation, which is a covert operation.”⁷⁵ Elaborating, the Director explained that he commanded the mission but that “the real commander” was the Commander of Joint Special Operations Command, a component of the armed forces.⁷⁶ Although his motives for the characterization were unclear, it would not be unreasonable to detect some effort to fend off allegations that civilian participation in a military operation would have been illegal. Although agency lawyers might have later advised him otherwise, particularly given the non-international nature of the conflict with al-Qaeda,⁷⁷ the Director’s response reveals at least intuitive or implied concern for the impact participation in hostilities might have on the status of his personnel.

Similar intermingling of the missions and assets of the military and civilian intelligence communities is apparent in the growing use of aerial drones.⁷⁸ Initially conceived as intelligence-gathering platforms, drones are now capable of carrying out highly lethal and destructive kinetic attacks.⁷⁹ Reports indicate the U.S. armed forces are not the sole operators of the nation’s arsenal of lethal drones.⁸⁰ Intelligence organizations such as the Central Intelligence Agency own and “pilot” drones capable of attack operations, providing a compelling example of blurred lines between intelligence activities and conduct of hostilities. Moreover, the United States no longer holds a monopoly on lethal drone technology, if indeed it ever held one. States such as Israel, China and France are reported to possess lethal drones, broadening the scope of involved international actors.⁸¹ Although perhaps only now in its infancy, drone use has already provoked intense legal debate. The majority of debate currently concerns authority for States to use lethal force outside the traditional confines of battlefields.⁸² Yet strains of debate concerning the authority of non-military personnel to participate in hostilities are gaining momentum.⁸³

Further intermingling of government civilian and military communities is envisioned in emerging mid- and postwar nation-building doctrine. An outgrowth of admitted failures in the Iraq and Afghanistan conflicts, stability operations seek to build government capacity either to hasten or to sustain transitions from war to peace.⁸⁴ Stability operations emphasize “soft power” such as education, agricultural, economic and humanitarian assistance to address the deeper causes of armed conflict. Consistent with popular notions of the “three-block war,” stability operations may occur at the same time as, and very near, active hostilities.⁸⁵ In 2005, stability operations received a high-powered endorsement in the form of a Department of Defense directive.⁸⁶ The directive instructed all U.S. commanders to give stability operations “priority comparable to combat operations.”⁸⁷ Yet the centerpiece of military stability operations doctrine is the conviction that the armed forces must perform only a supporting role. Stability operations envision

heavy, often lead-agency roles for civilian governmental organizations such as the U.S. Department of State, Department of Justice and the U.S. Agency for International Development.⁸⁸ While actual civilian agency participation has lagged behind expectations, stability operations that intermingle civilian and military missions, particularly in complex or dynamic security environments, seem on the rise and likely to blur notions of participation in hostilities.⁸⁹

A final emerging field of warfare also illustrates the intermingling of agencies provoked by modern armed conflict. States increasingly recognize cyberspace as a critical domain of national security.⁹⁰ Few steeped in this evolving form of conflict are unfamiliar with stories of empty legal formalism with respect to personnel involved in cyber operations. Informal discussions of practices associated with State involvement in cyber operations frequently recall stories of the uniformed service member who clicks “Send” at the conclusion of a cyber operation otherwise prepared, designed, scouted and executed exclusively by civilian personnel. Although off-the-record and susceptible to exaggeration, no doubt, the anecdote may be indicative of both the extent of civilian participation in U.S. cyber operations up to and likely including the moment of attack, and ingrained or intuitive notions of what constitutes lawful civilian participation in hostilities.⁹¹

Second, as the armed conflict in Libya showed, a stronger international spotlight shines on NIAC than previously. The legal character of the Libyan conflict is complex. It is clear that by February 2011, hostilities rose beyond mere riot and crossed the threshold for armed conflict, resulting in a NIAC for legal purposes. Yet not long afterward, international intervention on behalf of the rebels in mid-March likely converted portions of the conflict into IAC for the legal purposes of participating States.⁹² Whether the situation devolved into two separate conflicts, an IAC between Libya and the NATO States conducting attacks on one hand, and a NIAC between the Libyan government and the rebels on the other, is debatable.⁹³ The better view acknowledges each as a separate conflict, notwithstanding practical complications. Either way, media and social networking made the details of government reactions to civil disturbances and especially the rebel armed groups instantly public.⁹⁴ Even the academic legal community responded, producing near-instantaneous analysis and reactions to the conflict.⁹⁵ The information age appears to have ended the era when States could rely upon the internal nature of NIAC to shield the nature of their responses from public attention. One wonders whether the same can long be said with respect to international legal attention.

Third, and finally, the rise of so-called transnational armed conflict may bring pressure on the government forces status void. “Transnational armed conflict” typically describes armed conflict between a State and non-State actors not confined to the State’s own territory.⁹⁶ U.S. operations against al-Qaeda since 2001 are often

cited as an example of transnational armed conflict given their extension beyond the sites of the original 2001 attacks to at least four continents. Although of limited legal recognition and acceptance among law-of-war experts, transnational armed conflicts remain related to NIAC in their likely scope of international regulation. At present they remain, in the most important respect for purposes of conflict classification, non-international. That is, despite crossing international borders, transnational armed conflicts still do not pit two States directly against one another.

Yet the broader geographic and political scope of transnational armed conflicts may render increased input from international law attractive to important international legal personalities. Transnational armed conflict greatly strains traditional territorial or politically based claims of exclusive sovereign prerogative on the part of the government under attack. Classic, non-extraterritorial NIAC has relied greatly on traditional notions of territorial sovereignty to fend off international regulation. With their associated cross-border incursions and movements, transnational armed conflicts unmoor NIAC from many of its traditional claims to general freedom from international regulation. To be sure, the soundest approach looks for such regulation from the traditional sources of international law—the agreements and binding practices of States. But from a normative perspective, rights of non-intervention in internal affairs⁹⁷ and insulation from international legal meddling seem significantly weaker in transnational armed conflict.

The emerging forms of warfare showcased above reinforce the point. To return to cyber operations, it appears nearly impossible to conduct an effective, networked cyber attack within the territory of one State.⁹⁸ For instance, although of uncertain origin, the denial of service attacks suffered by Estonia in 2007 are estimated to have transited servers and networks located in as many as 178 countries.⁹⁹ Cyber attacks are likely to appear attractive to non-State actors challenging better-resourced government opponents in NIAC.¹⁰⁰ Cyber warfare offers insurgents anonymity, economy and access to destructive potential often difficult to acquire with respect to kinetic means.¹⁰¹ To the extent cyber operations can be expected as a feature of NIAC, these conflicts will continue to involve transnational elements, such as attacks either originating from the territory of third-party States or at least transiting servers therein. Government responses to insurgent cyber attacks may be less than discriminating given the difficulties of cyber attribution. One can easily foresee false positives leading governments in NIAC to unwittingly attack assets of neutral third-party States. The temptation to resort to international law of war to regulate such events, to the extent they are not already regulated in the *jus ad bellum* and law of State responsibility, may be great.

Ultimately, the effect of each of these phenomena of modern armed conflict—mixing of traditional missions, increasingly available information on how States

conduct NIAC and the enlarged geographic scope of NIAC—is likely to be heightened scrutiny of State responses to NIAC. If, as the prior section asserted, State responses have largely conformed to tradition, modern conflict’s demand for interagency responses will likely involve actors not traditionally associated with direct participation in NIAC. If States could formerly rely on the fog of war and geographic borders to obscure the details of how and with whom they carried out military operations, the networked world will certainly make their practices and tactics apparent and subject to scrutiny. And if the previously internal nature of NIAC permitted States to defend claims of sovereign prerogative, the increasingly transnational nature of NIAC will surely increase pressure to internationalize the applicable legal regime, perhaps even with respect to status.

Re-examining Status in NIAC

The extent to which one concludes the international law of NIAC regulates the status and composition of government forces may be a function of the level of legal generality at which one operates. As demonstrated above, the positivist claim to international regulation of the topic is weak. Certainly, no specific treaty provisions address the subject directly. Nor does one find extensive signs of State consent to international regulation of the topic through recitation of custom or litigation generally. Yet drawing back to the level of principles, one might find evidence to undermine the voids previously described. Paired with looser interpretive practices, such as giving tangible effect to the perceived objects and purposes of such legal norms, a colorable case for limits on government forces in NIAC emerges.¹⁰² This section examines briefly the case for principle-derived international law limits on State participation in NIAC similar to the status-based limits found in IAC.

The principle of distinction has been called “the grandfather of all principles” of the law of armed conflict.¹⁰³ Enumerated alternately as “distinction”¹⁰⁴ or “discrimination,”¹⁰⁵ in both practice and custom warriors have long recognized the principle. Distinction’s first clear codification appeared in one of the founding documents of the law of armed conflict. The U.S. Lieber Instructions, drafted in 1863, state:

[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.¹⁰⁶

The modern international law of armed conflict expresses the principle similarly in Additional Protocol I, Article 48, titled appropriately “The Basic Rule.”¹⁰⁷ Most frequently, distinction operates on the targeting practices of combatants, restricting lawful attacks to legitimate military objectives and enemy combatants and fighters.¹⁰⁸ Distinction forbids attacks on civilians not participating directly in hostilities and on civilian objects.¹⁰⁹ The principle also forbids attacks producing effects that cannot be contained or limited to their intended targets.¹¹⁰

Beyond limiting attacks and their effects to lawful targets, distinction also comprises combatants’ duty to distinguish *themselves* from civilians. Located among the Additional Protocol I provisions related to prisoner-of-war and combatant statuses, Article 44 requires that combatants “distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.”¹¹¹ Historically, combatants have satisfied this aspect of distinction by setting themselves apart from civilians both spatially and in appearance. Uniforms and the practice of carrying arms openly, combined with tactics involving tight formations and relatively confined battlefields, formerly made distinction a relatively simple matter. Recognizing modern practices of militia and other organized resistance movements in twentieth-century warfare, however, Article 44 permits combatants to derogate from distinguishing themselves in the traditional manner in some instances. Under Article 44, in occupied territory and wars of national liberation, unconventional combatants need merely carry arms openly during and in preparation for attacks.¹¹² Relaxing the uniform and insignia aspects of the distinction requirement, Article 44 proved one of the most contentious provisions of Protocol I.¹¹³ Yet the general duty for participants in hostilities to distinguish themselves clearly during combat persists.

Addressed more squarely to targeting operations than status, Additional Protocol I, Article 58 outlines precautions against attacks and reinforces the second aspect of the principle of distinction.¹¹⁴ Article 58 generally requires that parties remove or separate civilians located in their own territories from likely military objectives. Commentary to the rule clarifies its intent also to prevent construction of military buildings near civilian populations and objects.¹¹⁵ The rule’s relationship to distinction lies in its facilitation of attackers’ efforts to observe the principle themselves. In some sense, Article 58 responds to critiques that the targeting provisions of Additional Protocol I focus too narrowly on attackers.¹¹⁶ Law-of-war experts have observed that in many targeting scenarios, the defender or object of attack is better positioned to limit civilian casualties and collateral damage to civilian objects.¹¹⁷ Though perhaps not to the entire satisfaction of Protocol I critics, Article 58 remedies a portion of the supposed misallocation of the distinction burden.

Carried to its logical conclusion, the above conception of distinction, in both IAC and NIAC,¹¹⁸ can be understood to carry an implicit limitation on the categories of government actors authorized to take part in hostilities. In NIAC, government use of agencies or actors indistinguishable from the civilian population or from government agencies not participating directly in hostilities frustrates insurgents' efforts to observe the principle of distinction in their attacks. For instance, co-location of an interagency intelligence analysis cell with other civilian agency assets not engaged in a NIAC effort might frustrate discriminate attacks on the former. More important, widespread use of personnel from civilian government agencies to conduct hostilities in NIAC could easily induce insurgent forces to regard all civilian government personnel as hostile, even those not actually taking direct part in attacks.

As critics of Additional Protocol I observe, the defender, in this case the *de jure* government, is usually better positioned to prevent harm to civilians. Either by clearly identifying persons taking direct part in hostilities on behalf of the government or by restricting such activities to members of the armed forces, the government could greatly aid efforts to ensure discriminate attacks. Under the proposed principle-based rule, any contrary course of action would be characterized as inconsistent with the principle of distinction or at least inconsistent with its object and purpose.

Such a rule might easily translate into a status-like conception for NIAC. Although NIAC generally rejects the use of status to apportion authority and protection, a distinction-derived rule limiting participation in hostilities to members of the government armed forces might operate similarly to a status-based rule. In practical terms, the rule would create two categories of persons in NIAC: those whose direct participation does not frustrate the principle of distinction and those whose direct participation in hostilities violates the principle. Such bifurcations are entirely parallel to the status-based legal regime of IAC in important respects, lacking only the familiar taxonomy of combatant and civilian.

Finally, in addition to the rule's logical connection to the most important principle of the law of war, proponents might point to recent trends toward parity between the international law of IAC and that of NIAC. The very late twentieth and early twenty-first centuries have seen an expansion of international instruments applicable in NIAC as well as extensions of existing IAC treaties into NIAC. Major treaties expanded to cover NIAC include the 1954 Hague Cultural Property Convention;¹¹⁹ the 1980 Convention on Conventional Weapons, including its five protocols;¹²⁰ the 1997 Ottawa Landmines Convention;¹²¹ the 1993 Chemical Weapons Convention;¹²² and the 2008 Convention on Cluster Munitions.¹²³ Additionally, 118 States have ratified the Rome Statute of the International Criminal

Court, which includes a highly developed article of war crimes in NIAC.¹²⁴ Beyond application of the technical provisions of these treaties, such expansions might signal an important erosion of State hostility toward international regulation of the conduct of hostilities in NIAC.

In sum, attractive logical, humanitarian and even mildly positivist cases might be made for status-like limits on government forces participating in NIAC. For purposes of argument, this section imagines a distinction-derived rule that would, as some consider is the case in IAC, limit direct participation in hostilities in NIAC to armed forces or militia similarly organized and belonging to a party to the conflict.¹²⁵ In fact, a recent book dedicated to the topic of combatant status in NIAC asserts as much, arguing, “By definition, any person who participates in an internal armed conflict who is not a member of the states’ armed forces is an ‘unlawful’ combatant—that is, a person who is not immunized for their warlike acts.”¹²⁶ Despite apparent humanitarian payouts, the imagined rule runs afoul of important structural and technical facets of the law of war. Logical, structural and practical reasons counsel against recognition of the rule as *lex lata* and perhaps even as *lex ferenda*.

First among logical objections, the distinction-derived rule proves too much. The logic of the proposed rule would extend to practically absurd conclusions. For example, the appearances of some non-military government actors in NIAC would not frustrate the principle of distinction. Many States’ domestic security forces would appear to most observers as combatants. Few, if any, NIAC fighters could claim to have been misled by the uniforms, armaments and even vehicles used by such actors despite their non-military character. Yet because they are not actually armed forces or, alternatively, not subject to a system of command and internal discipline they would be excluded from conducting hostilities under the supposed rule. The same might easily be said of private security contractors employed by States in NIAC. For all the complexities PSCs have introduced to the modern battlefield, confusion with innocent civilians is not typically among them.¹²⁷

Additionally, a blanket rule limiting government conduct of hostilities in NIAC to members of the armed forces would extend beyond situations that implicate the appearance of the hostile actor at all. So-called over-the-horizon or non-line-of-sight attacks seem not to provoke concern that the attacker distinguish him- or herself through visual means. In this respect, there is great danger that the distinction-derived rule would operate too broadly in a logical sense. That is, application of a rule requiring the wearing or display of distinctive insignia or uniforms applied to over-the-horizon warfare fails to serve the rule’s intended purpose of facilitating the defender’s efforts to distinguish attackers from innocent, non-hostile parties. Limiting the conduct of attacks to members of the armed forces in such

circumstances amounts at least to empty formalism—and at worst to absurdity—harmful to the reputation and perceived legitimacy of the law of war.

As related above, the material field of application of a number of important international law-of-war instruments has recently been expanded to NIAC. By their terms, these treaties formerly regulated only IAC. Previously, their extension to NIAC could only be achieved by proof of customary status—a technique fraught with ambiguity and subject to vexing caveat. It may be, as previously observed, that these expansions reflect a reduction of State hostility to international regulation of NIAC. Yet closer examination suggests evidence of a more restrained enthusiasm for international regulation of NIAC.

With the notable exception of the Rome Statute, each of the treaties recently expanded to cover NIAC concerns means and methods of warfare. They are primarily weapons treaties consistent with the Hague tradition of the law of war.¹²⁸ Weapons treaties have long been an exception to the use of status to apportion protection in IAC. In contrast to the instruments of the so-called Geneva or “respect and protect” tradition, weapons treaties associated with the Hague tradition have operated universally, benefiting both combatants and civilians, though typically in a collateral sense with respect to the latter. Weapons treaties usually do not concern interpersonal interactions or the control of individuals and have not been a source of protected or privileged status under the law of war. None of the expanded treaties introduces to NIAC a new or protected status. While certainly humanitarian advances and arguably a boon to the prospect of international regulation of NIAC, the recent expansions actually reflect no alternation whatsoever to the general dearth of status-based regulation in NIAC. The larger significance of these expansions may not be general State willingness to submit to international regulation of NIAC, but rather recognition of the near-perfect alignment of concern for unnecessary suffering produced by certain classes of weapons in both IAC and NIAC.

By contrast, the Rome Statute’s significant NIAC jurisdictional grant to the International Criminal Court (ICC) spans both traditions of the law of war. The NIAC-relevant portions of the Rome Statute undoubtedly represent a significant concession to the international legal system. And other international tribunals share the ICC’s broad authority with respect to conduct in NIAC.¹²⁹ Yet the extent to which the mandates of these tribunals reflect willingness to commit NIAC to the international legal system should not be overstated. First, it should be remembered that the jurisdiction of the ICC, through the principle of complementarity, takes a backseat to domestic proceedings.¹³⁰ States willing and able to hear claims arising from participation in NIAC in their own courts preempt ICC jurisdiction. Complementarity stands as a powerful bar to international intrusion into NIAC.

Second, the most legally significant outcomes of the decisions at the International Criminal Tribunal for the former Yugoslavia (ICTY) have been achieved only through controversially broad outlooks on the scope of customary law applicable to NIAC. None is better illustrative than the ICTY decision in *Prosecutor v. Tadić*, in which the Appeals Chamber observed that the distinction between IAC and NIAC had lost much of its value and weight.¹³¹ The Tribunal's observation is only defensible under the least rigorous conceptions of customary international law. Applied to the nationals of minor powers, involved in unquestionably inhumane conduct, the Appeals Chamber's observation attracted only minor protest. One wonders whether applied to agents of more influential international actors, and to less obviously atrocious circumstances, the Chamber's bold pronouncement would have weathered as well.

Third, and most important, it should be understood that criminal tribunals deal with conduct, as distinct from status. For the tribunals, status is examined solely for the purposes of evaluating jurisdiction or determining whether charged conduct satisfies the elements of an enumerated offense. For instance, a tribunal vested with jurisdiction to hear grave breaches of the Third Geneva Convention must determine whether any alleged victims held the status of prisoner of war as understood by that Convention.¹³² Similarly, grave breaches of the Fourth Convention require that purported victims be protected persons as defined by Article 4 of that Convention.¹³³ Criminal tribunals do not resolve questions of status for their own sake or for such inherently political purposes as determining the legitimacy of participation itself. None of the tribunals has litigated status as such or at least in the sense applied by this chapter. Despite a rich jurisprudence concerning NIAC, no international case has examined status of any fighter with respect to lawfulness of mere participation. Claims advancing a distinction-derived rule on government participation in hostilities in NIAC likely confuse conduct with status.

The preceding argument illustrates a critical point, namely, the function of status. Status is instrumental; it is an intermediary for larger, more meaningful legal outcomes. Under the laws of war, status confers protection, treatment, obligations and, in the case of combatants, a limited form of immunity from prosecution. While protection from hostilities, treatment standards upon capture and other obligations concerning handling of captured combatants share an essentially humanitarian impetus, immunity remains an end distinct from the humanitarian status-derived ends. Immunity is quintessentially political. Immunity from prosecution for participation in hostilities and the derivative rule limiting the classes of persons who may claim immunity lie at the heart of sovereignty. If status is conceived as a gateway to immunity, then it is true that in NIAC "status is the prize for which fighting is waged."¹³⁴ The suggestion, such as that advanced

by the distinction-derived rule on government forces in NIAC that States would surrender the ultimate prize of revolutionary war to the international legal system, is severely at odds with both the historical experience of NIAC, and their clearest self-interest. In terms of logical argument, conceiving status in NIAC as a means to lawful participation begs the question of the conflict itself. Only if status is conceived as an instrumentality to purely humanitarian ends can it be fairly said to operate at all with respect to government forces in NIAC.

From a still wider perspective, it is difficult to reconcile serious claims of IAC-NIAC parity with the positivist record.¹³⁵ As emphasized above, States have consistently, by compelling majorities, rebuffed invitations to drop the IAC-NIAC distinction in law-of-war treaties.¹³⁶ Even where States have consented to overlapping norms, they have made critical caveats. The Martens clause made an early appearance in the Hague Conventions and has reappeared in nearly every major law-of-war instrument since. An eponymous homage to an influential Russian diplomat, the clause first resolved an impasse of the treatment of resistance fighters during belligerent occupation by referring to the common law of war and to more general norms of humanitarian treatment.¹³⁷ Since then, the clause has served the function in treaties of holding a place for the customary law of war, and also as a sort of residual clause for the operation of peacetime humanitarian norms.

While the clause appears in the NIAC-specific Additional Protocol II of 1977, it bears crucial alterations to its traditional form.¹³⁸ The Protocol II iteration excludes reference to “law of nations”/“international law” and “established custom.”¹³⁹ Also omitted is the traditional reference to “usages established among civilized peoples.”¹⁴⁰ Academic commentary to Additional Protocol II indicates these were deliberate omissions, intended to honor States’ historical reluctance to commit NIAC to international law.¹⁴¹ As is plain, each omission shares with the others reference to the international legal system. A clearer desire to keep international norms at bay in NIAC is difficult to conjure. That States would in the modern period of positive law-of-war development require alterations to such a widely accepted and fundamental precept of the law of IAC certainly bears witness to the persistence of the IAC-NIAC divide.

To be sure, some IAC norms transpose easily to NIAC. International tribunals and respected non-governmental and academic studies have made compelling cases to close the substantive legal gap between the two recognized conflict types.¹⁴² For instance, minimal treatment standards for persons in custody applicable in IAC present few, if any, NIAC-specific obstacles to military or political necessity. But even if many IAC norms transpose easily, status does not appear to be one of them. Although a certain parity between treatment obligations and protections in IAC and NIAC can be conceded, it is worth noting that status has not made the leap

between two conflict types. Conferral of status, even as a humanitarian instrumentality, has proved the point where State willingness to level the law of IAC and that of NIAC ends. The issue remains of sufficient political importance to NIAC to withstand even the considerable aforementioned pressures on the existing NIAC status void.

Finally, and aside from descriptive debates, calls for leveling the international law of NIAC with that of IAC fail to make the normative case that international law is the best answer to perceived problems in NIAC. Typically claims that IAC norms have migrated to NIAC appeal to strong humanitarian logic. How could persons, especially victims of hostilities, be less deserving of protection simply by virtue of conflict classification? While compelling on some levels, these claims fail to appreciate the entire calculus of commitment of an issue to the international legal system. Commitments to international law reflect not only normatively desirable outcomes, but also the judgment of States that such outcomes are best achieved collectively rather than independently. No single theory of international law prescribes a comprehensive formula for such determinations. States appear to make such determinations on an ad hoc basis, balancing multiple and dynamic variables.

Since the late nineteenth century, States have judged international law as a good fit for international armed conflict largely by virtue of the identities of the actors. Coincidence of interests and guarantees of reciprocity continue to inform the international bargains struck through treaties. By definition, the parties to NIAC upset the logic of this prescription. Assumptions concerning capacity and willingness to observe internationally based legal obligations do not migrate from IAC to NIAC as easily as rules themselves. Moreover, domestic legal systems' implementations of international law are often imperfect. Legal nuances are often lost in translation, frustrating expectations of uniformity and universality. Hard-won bargains at diplomatic conferences may be selectively or not at all implemented. Considering the inherently internal, sovereign nature of issues in NIAC, the likelihood that international norms would be implemented to the credit of international law legitimacy seems dim. Finally, modern perceptions of the laws of war themselves may be part of the problem. Characterizations of the law of war as exclusively humanitarian mislead and present an incomplete picture of its true object and purpose.¹⁴³ While many of the humanitarian aspects of the law of IAC have proved well disposed to migration to NIAC, the use of status generally, and particularly to apportion political outcomes such as immunity, appears to be the current limit of State willingness to submit to IAC-NIAC legal parity.

Conclusion

As the chapter's opening assertion, a gross generalization to be sure, suggests, international lawyers' reactions to purported voids in international law coverage vary greatly according to interpretive preferences and general outlooks on international law. Whatever one's interpretive bent, it seems undeniable that positive voids in international law no longer mean what they used to. Substantive gaps in treaty coverage seem to represent neither the end of descriptive debate, nor the beginning of the end, but only perhaps the end of the beginning of such discussions.¹⁴⁴ In addition to the possibilities of international custom, theories accepting a proliferation of "international lawmakers" now include suggestions that non-State actors might form international law, greatly increasing the likelihood that perceived voids will be filled to the satisfaction of interpretivist schools of thought.¹⁴⁵ The signs are all around that if the NIAC status void is to remain in effect it will have to be defended rather than assumed.

With respect to the status of government forces in NIAC a distinction-derived rule limiting government forces' participation in hostilities explored in this chapter is more than a rhetorical straw man. Accepting evolution in NIAC, the prospect of international regulation appears highly possible. In addition to changes in international law interpretive theory, evolutions in State military doctrine applicable to NIAC and increased popular attention to how NIAC is waged by States provide fertile ground for transplanting IAC norms into NIAC.

Despite their shortcomings, *jus in bello* treaties have been highly successful at humanizing IAC. The desire to import such success to NIAC is both laudable and understandable. Yet voids are not in all cases invitations to interpretive gap-filling. Voids are, as in the case of status in NIAC, often reflections of States' general outlook on the propriety and likely efficacy of international regulation. To preserve the legitimacy of the law of war generally, a sound and principled methodology is needed to regulate the migration of norms from IAC to NIAC.

It may be fair to say the *jus in bello* is under-theorized and thus not up to the task. Compared to domestic legal regimes, international law generally and even its legal sibling the *jus ad bellum*, the law governing the conduct of hostilities lacks a deliberate and well-defended interpretive theory. One finds far greater attention to compliance theory in *jus ad bellum* than *jus in bello*.¹⁴⁶ That law-of-war specialists haven't paid particular attention to interpretive theory is to some extent forgivable. The pressing practicalities of its relevance, the life-and-death implications of its operation, and the still unsorted doctrinal and descriptive challenges are enough to occupy a career. However, in addition to the possibility of resolving a pressing

doctrinal question, the NIAC status void may offer an opportunity to spark more deliberate discussion of interpretive theory in the *jus in bello*.

The temptation to address voids from a purely humanitarian perspective can be great. Yet purely moral reasoning fails to account for the current positive disparities between the law of IAC and that of NIAC. Ultimately, deliberate and principled interpretive efforts, such as this chapter has endeavored to provide, present the more promising course, unveiling areas of potential progress, while sustaining the underlying logic and nature of the current international legal system.

Notes

1. Professor Hart described “rule-scepticism” as “the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them.” H.L.A. HART, *THE CONCEPT OF LAW* 133 (1961).

2. This article uses the term “non-international armed conflict” to describe hostilities between a State and an organized armed group not formally affiliated with a State. Significant debate has developed over the scope of conflicts included in the term “NIAC.” Classically, conceptions of the regulation of such conflicts have been confined to the territory of a single State. See Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 37, 44 (Karen J. Greenberg & Joshua Dratel eds., 2005) (rejecting application of Common Article 3 of the 1949 Geneva Conventions to cross-border conflicts with non-State actors) [hereinafter *THE TORTURE PAPERS*]. Controversy notwithstanding, there is strong support for the notion that when they adopted the term NIAC, States meant to refer only to civil wars in the classic sense. See ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 41–49 (2010). Recently, scholars have called for legal recognition of a class of conflict between State actors and non-State actors that crosses international borders, such as the United States’ conflict with al-Qaeda. See Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *TEMPLE LAW REVIEW* 787 (2008) (advocating recognition and application of the law of war to “transnational armed conflict”).

3. The 1949 Geneva Conventions, synonymous for many with the law of war, include over four hundred provisions addressed specifically to international armed conflict and only one addressed to non-international armed conflict. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention IV].

4. The most widely accepted treaty-based definition of international armed conflict is found in Common Article 2 of each of the four 1949 Geneva Conventions. Additional Protocol I to the Conventions controversially expanded the scope of material application of the Geneva

tradition to so-called wars against “colonial domination and alien occupation and against racist regimes” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. States parties to Additional Protocol I have interpreted the phrase narrowly, however, greatly limiting the practical effect of the expansion. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 123–25 (2010).

5. See U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863 [hereinafter Lieber Code], reprinted in *THE LAWS OF ARMED CONFLICTS* 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Schindler & Toman]. Originally issued as military policy, the Instructions—or Lieber Code, as it is now widely known—inspired States not only to codify the customs of warfare but also to commit these rules to international, rather than domestic, law. See Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 *AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS* 112 (2001); Richard R. Baxter, *The First Modern Codification of the Law of War*, 3 *INTERNATIONAL REVIEW OF THE RED CROSS* 171 (1963).

6. See, e.g., Georges Abi-Saab, *Non International Armed Conflicts*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 217, 218–25 (UNESCO ed., 1988) (noting absence of provisions dealing with attacks on civilians in Article 3 of the 1949 Geneva Conventions); Michael Bothe, *Article 3 and Protocol II: Case Studies of Nigeria and El Salvador*, 31 *AMERICAN UNIVERSITY LAW REVIEW* 899 (1982) (illustrating legal gaps through case studies and arguing Protocol II did not go far enough toward advancing humanitarian causes in NIAC).

7. HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 323 (1992) (observing that “[r]eferences to ‘prisoner of war’ status would be legally and politically inappropriate in a context of non-international armed conflict”).

8. Combatant status is also used with reference to persons lawfully targetable under the law of IAC. See Additional Protocol I, *supra* note 4, art. 50.

9. See 1949 Geneva Convention I, *supra* note 3, art. 2. So-called Common Article 2, as it appears identically in each of the four 1949 Geneva Conventions, identifies the category of conflict to which the Conventions apply. See David E. Graham, *Defining Non-International Armed Conflict: A Historically Difficult Task*, which is Chapter III in this volume, at 43; Charles Garraway, *War and Peace: Where Is the Divide?*, which is Chapter V in this volume, at 93; Geoffrey S. Corn, *Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello*, which is Chapter IV in this volume, at 57.

10. See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (identifying prohibited categories of weapons and weapons generating additional obligations through five separate protocols, including weapons with undetectable fragments, mines and booby traps, incendiary weapons, blinding lasers, and explosive remnants of war) [hereinafter Conventional Weapons Convention].

11. See Paul Kantwill & Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons,”* 28 *FORDHAM INTERNATIONAL LAW JOURNAL* 681 (2005).

12. See, e.g., *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 164–71 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) (reversing, unfortunately, a Trial Chamber’s highly informed and principled application of protected-person status under the Fourth Geneva Convention) [hereinafter *Prosecutor v. Tadić*].

Status of Government Forces in Non-International Armed Conflict

13. The most significant exception to the status-dependent international law of war is the category of rules limiting weapons and means of warfare, the so-called Hague tradition. *See infra* text accompanying note 128.

14. COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958) [hereinafter GENEVA CONVENTION IV COMMENTARY].

15. *See* Additional Protocol I, *supra* note 4, arts. 48–71.

16. *See* 1949 Geneva Convention I, *supra* note 3, arts. 12–13 (outlining, respectively, protections owed to the wounded and qualification criteria for the status of wounded).

17. Additional Protocol I, *supra* note 4, art. 51(3). A recent symposium offers a helpful cross-section of views on the meaning of this phrase. Forum, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 637 (2010). Article 13 of Additional Protocol II applicable to NIAC replicates Article 51(3), although without an accompanying definition of the term “[c]ivilians.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

18. *See* 1949 Geneva Convention I, *supra* note 3, art. 13.

19. *See* 1949 Geneva Convention III, *supra* note 3, art. 4. *See also* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 39–51 (2d ed. 2010) (providing a clear application of the prisoner-of-war qualification criteria); Memorandum from Alberto R. Gonzales, Counsel to the President, Office of Counsel to the President, to George W. Bush, President of the United States, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), reprinted in THE TORTURE PAPERS, *supra* note 2, at 118, 121 (offering a controversial application of the prisoner-of-war criteria). Reinforcing the importance of prisoner-of-war status, the Third Geneva Convention requires detaining powers convene “competent tribunals” to determine the proper status of detainees potentially eligible for protection under the Convention. *See* 1949 Geneva Convention III, *supra*, art. 55.

20. *See* 1949 Geneva Convention IV, *supra* note 3, art. 4. *See also* Derek Jinks, *The Declining Significance of P.O.W. Status*, 45 HARVARD INTERNATIONAL LAW JOURNAL 367 (2004) (explaining the nature of the Fourth Convention’s protective regime); Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2003) (explaining clearly the application of qualifying criteria for Fourth Convention protected persons status).

21. 1949 Geneva Convention IV, *supra* note 3, art. 13. The “whole of the populations of the countries in conflict” receives the protections of Part II of the Fourth Convention. *Id.* Part II protects access to medical treatment as well as shelter from the effects of hostilities through hospital and safety zones. *Id.*, arts. 14–26.

22. *Id.*, art. 4. The Fourth Convention leaves protection of nationals of neutral States largely to the diplomatic system. *See* GENEVA CONVENTION IV COMMENTARY, *supra* note 14, at 48.

23. 1949 Geneva Convention IV, *supra* note 3, arts. 78–79. The Fourth Convention prescribes a detailed regime of treatment obligations for interned protected persons in Part IV. *Id.*, arts. 79–141.

24. Regulations Respecting the Laws and Customs of War on Land art. 3, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (distinguishing, within the armed forces, combatants from non-combatants such as chaplains and medical personnel) [hereinafter 1907 Hague Convention IV].

25. See Additional Protocol I, *supra* note 4, arts. 46–47; Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323 (1951). The status of unprivileged belligerent or unlawful combatant has provoked significant legal debate. A strong textual case can be made that no such separate, treaty-based status exists. See Mark Maxwell & Sean Watts, *Unlawful Enemy Combatant: Status, Theory of Culpability, or Neither?*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 19 (2007) (concluding U.S. use of the term “unlawful enemy combatant” reflects legal convenience more than objective assessment of the existing laws and customs of war); Dörmann, *supra* note 20, at 46–47 (emphasizing that neither term appears in the 1949 Geneva Conventions). *But see* DINSTEIN, *supra* note 19, at 33–36 (defending, in one of the most respected texts on the *jus in bello*, recognition of the class of unlawful combatant).

26. See, e.g., *Prosecutor v. Tadić*, *supra* note 12, ¶¶ 164–69 (announcing surprising legal findings on Fourth Geneva Convention protected-person status).

27. See UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.6.1 (2004) (stating, “The law relating to internal armed conflict does not deal specifically with combatant status or membership of the armed forces”) [hereinafter UK LOAC MANUAL]; SOLIS, *supra* note 4, at 191 (observing, “[T]here are no ‘combatants,’ lawful or otherwise, in Common Article 3 conflicts”).

28. Additional Protocol II, *supra* note 17, art. 5.

29. See Additional Protocol I, *supra* note 4, art. 43(2) (stating, “Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities”) (parenthetical omitted).

30. Codified protection of prisoners and the status of prisoner of war date back to some of the earliest multilateral law-of-war instruments. See Lieber Code, *supra* note 5, arts. 53–56; PROJECT OF AN INTERNATIONAL DECLARATION CONCERNING THE LAWS AND CUSTOMS OF WAR arts. 23–34 (Aug. 27, 1874), available at <http://www.icrc.org/ihl.nsf/INTRO/135?OpenDocument>; Institute of International Law, *Oxford Manual 1880: The Laws of War on Land*, reprinted in Schindler & Toman, *supra* note 5, at 29, arts. 61–72; Hague Convention (II) Respecting the Laws and Customs of War on Land with Annex of Regulations arts. 4–20, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention II].

31. Not all prisoners of war enjoy combatant immunity. For instance, while “war correspondents, supply contractors, and members of labor units” who accompany the armed forces qualify for prisoner-of-war status, few if any detaining powers would be likely to afford combatant immunity in the event they took a direct part in hostilities. 1949 Geneva Convention III, *supra* note 3, art. 4.A(4). This view accords with the inclusion of these groups in the law-of-war definition of civilian. See Additional Protocol I, *supra* note 4, art. 50.

32. Writers have adopted the term “fighters” to describe persons taking direct part in NIAC hostilities, whether government or rebel. See, e.g., MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 1.1.2 (2006) [hereinafter NIAC MANUAL]; I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW rule 6 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (omitting entirely reference to non-international armed conflict in rules governing “Combatants and Prisoners-of-War”) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW].

33. See NIAC MANUAL, *supra* note 32, ¶ 3.6 (outlining minimal protections afforded to “[p]ersons whose liberty has been restricted”); UK LOAC MANUAL, *supra* note 27, ¶ 15.6.3; Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, which is Chapter VI in this volume, at 119.

34. See UK LOAC MANUAL, *supra* note 27, ¶¶ 15.34–15.56 (reviewing rules added to the law of NIAC by Protocol II without mention of prisoner-of-war status).

35. Additional Protocol II, *supra* note 17, art. 5. Article 6 echoes this reluctance, referring to “those deprived of their liberty for reasons related to the armed conflict.” *Id.*, art. 6.

36. See 1949 Geneva Convention III, *supra* note 3, art. 3; Additional Protocol II, *supra* note 17, art. 5. An increasing number of international lawyers view international human rights law (IHRL) as applicable or at least complementary to the law of war. See RENE PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); Françoise J. Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 549 (2008); Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 501 (2008); Dietrich Schindler, *Human Rights and Humanitarian Law*, 31 AMERICAN UNIVERSITY LAW REVIEW 935 (1982). Particularly given the territorial nature of NIAC, many would regard IHRL as a source of treatment obligations in NIAC. Nonetheless, this chapter focuses exclusively on protections derived from the law of war.

37. By comparison, in IAC armed groups not part of States’ regular armed forces can gain prisoner-of-war status for their members by complying with criteria enumerated in the Third Geneva Convention: belonging to a party, submitting to a command hierarchy, bearing arms openly, wearing distinctive insignia and observing the laws of war. See 1949 Geneva Convention III, *supra* note 3, art. 4.A(2).

38. See EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS ch. 5, 256–70 (2008) (outlining domestic prosecutions arising from NIACs); NIAC MANUAL, *supra* note 32, ¶ 3.7 (outlining due process obligations applicable to domestic prosecution for “crime[s] related to the hostilities”); THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW ¶ 1202.3 (Dieter Fleck ed., 2008) (noting States’ interest in prosecution of insurgents’ acts of murder and destruction in NIAC) [hereinafter HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW].

39. Additional Protocol II, *supra* note 17, art. 6(5). Commentary interprets the clause as intended to promote general reconciliation rather than to recognize or effectuate any right to immunity or amnesty held by captured fighters. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1402 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

40. The most widely applicable standard for combatant status is found among select provisions of the Third Geneva Convention’s categories of prisoner of war. In an ironic twist, the LOAC definition of civilian identifies four categories of prisoner of war as constituting the combatant class in IAC. See Additional Protocol I, *supra* note 4, art. 50. For its States parties, Additional Protocol I refines in Articles 43 and 44 the criteria for combatant status. Combatant status under Protocol I is commonly understood to require only affiliation with an armed force or group which employs a system of discipline enforcing compliance with LOAC and carrying one’s arms openly in attack. See *id.* The Protocol’s elimination of the criterion of distinctive insignia or a uniform has been widely criticized. See Douglas Feith, *Law in the Service of Terror—The Strange Case of Additional Protocol I*, 1 THE NATIONAL INTEREST 36 (1985); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VIRGINIA JOURNAL OF INTERNATIONAL LAW 109 (1985); Abraham Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS 901 (1986). Although a persistent objector to some of Additional Protocol I, the United States regards significant portions of the Protocol as reflective of customary law. See Memorandum from W. Hayes Parks et al. to Mr. John H. McNeill, Assistant General Counsel, Office of the Secretary of Defense, 1977 Protocols Additional to the Geneva Conventions:

Customary International Law Implications (May 9, 1986), *reprinted in* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 388, 389 (Sean Watts ed., 2006); Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 419, 425 (1987).

41. UK LOAC MANUAL, *supra* note 27, ch. 15; OFFICE OF THE JUDGE ADVOCATE GENERAL, CHIEF OF DEFENCE STAFF, JOINT DOCTRINE MANUAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ch. 17 (2001) [hereinafter CANADIAN LOAC MANUAL]. The German law of armed conflict manual does not treat NIAC in detail. See FEDERAL MINISTRY OF DEFENCE, FEDERAL REPUBLIC OF GERMANY, *HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN – HANDBUCH* ¶¶ 210–11 (1992). The manual simply instructs German armed forces to apply “fundamental humanitarian provisions of international law embodied in the four 1949 Geneva Conventions (Common Art. 3), the 1954 Cultural Property Convention (Art. 19) and the 1977 Additional Protocol II” to NIAC. *Id.*, ¶ 211. Comments by a prominent German legal expert note that the International Criminal Tribunal for the former Yugoslavia interpreted this paragraph as a statement equating the law of IAC and NIAC. Wolff Heintschel von Heinegg, *The German Manual*, in INTERNATIONAL PEACE RESEARCH INSTITUTE, FORUM FOR INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW, NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT 112 (Nobuo Hayashi ed., 2d ed. 2010), available at <http://www.fichl.org/publication-series> (citing International Criminal Tribunal for the former Yugoslavia, *Tadic Jurisdiction Decision* ¶ 118). The UK *Manual on the Law of Armed Conflict* includes an interesting historical notation regarding French practice in Algeria. While French forces unsurprisingly tried and executed Algerian rebels without according prisoner-of-war status, the French also expected opposition fighters to accord prisoner-of-war status to captured French soldiers. UK LOAC MANUAL, *supra*, ¶ 15.4.1 n.21. The current U.S. law-of-war manual includes only a single paragraph on “civil war,” the bulk of which merely reprints Common Article 3 of the 1949 Geneva Conventions. Department of the Army, FM 27-10, *The Law of Land Warfare* ¶ 11 (1956). A closely held draft of a new U.S. manual is currently under review by executive branch agencies.

42. UK LOAC MANUAL, *supra* note 27, ¶ 15.6.1; CANADIAN LOAC MANUAL, *supra* note 41, ¶ 1706.1.

43. U.N. Charter art. 2(7). Article 2(7) states, “Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .” *Id.*

44. See UK LOAC MANUAL, *supra* note 27, ¶ 15.6.1.

45. A prominent law-of-war handbook asserts, “All states have legal frameworks which privilege their own police and armed forces as against insurgents who oppose them.” HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 38, ¶ 1202.2. Title 10 of the United States Code provides legal authority for and organizes the U.S. armed forces. Title 50 organizes employees of U.S. federal intelligence agencies. Recent operations, particularly those carried out against global terrorist networks, have blurred the lines of authority between Title 10 and Title 50 agencies. Debate has also developed over other agencies’ participation in national security activities, such as the U.S. Drug Enforcement Agency’s work in counterterrorism operations. See Johnny Dwyer, *The DEA’s Terrorist Hunters: Overreaching Their Authority?*, TIME.COM (Aug. 8, 2011), <http://www.time.com/time/world/article/0,8599,2087220,00.html>.

46. See James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, NEW YORK TIMES, Oct. 3, 2007 at A1.

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47. See Moshe Schwartz, Congressional Research Service, *The Department of Defense's Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress* (2011).

48. Several international criminal tribunals wield jurisdiction over the conduct of NIAC. See e.g., Rome Statute of the International Criminal Court art. 8(2)(c)–(f), July 17, 1998, 2187 U.N.T.S. 90 (amended Jan. 16, 2002) [hereinafter Rome Statute].

49. See GENEVA CONVENTION IV COMMENTARY, *supra* note 14, at 35.

50. See J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 AIR FORCE LAW REVIEW 155 (2005); Michael N. Schmitt, *Wired Warfare: Computer Network Attack and the Jus in Bello*, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 187, 198 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (Vol. 76, U.S. Naval War College International Law Studies). But see Sean Watts, *Combatant Status and Computer Network Attack*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 392 (2009) (arguing that perceived limits on types of persons and agencies States may employ in computer network attack are overstated).

51. See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 493, 508–11 (2003) (discussing the criteria for prisoner-of-war status and distinguishing entitlement to or loss of status from criminality).

52. LOUIS HENKIN, *HOW NATIONS BEHAVE* 253 (1968) (observing that “most states obey most law most of the time”).

53. See Sean Watts, *Reciprocity and the Law of War*, 50 HARVARD INTERNATIONAL LAW JOURNAL 365 (2009).

54. Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 931 (2008).

55. See GENEVA CONVENTION IV COMMENTARY, *supra* note 14, at 6–7. Jean Pictet observes, “Without [the guarantee] neither Article 3, nor any other Article in its place, would ever have been adopted.” *Id.* at 44.

56. See 1949 Geneva Convention IV, *supra* note 3, art. 3.

57. See Waldemar Solf, *The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice*, 33 AMERICAN UNIVERSITY LAW REVIEW 53, 57–58 (1983) (tracing recognition of combatant status to Belli, Grotius, Pufendorf and Vattel).

58. Additional Protocol I, *supra* note 4, art. 51(3). Article 51(3) states, “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”

59. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 39, at 514.

60. See DINSTEIN, *supra* note 19, at 33 (noting lawful combatants’ “license to kill”).

61. Early commentators viewed skeptically claims that international law could authorize or “give positive sanction to” States to do anything. 2 JOHN WESTLAKE, *INTERNATIONAL LAW* 52 (1907) (explaining that rules of war “are always restrictive, never permissive”). See also Roberts, *supra* note 54, at 935 (rejecting that international law grants belligerents the “right” to participate in hostilities); Baxter, *supra* note 25, at 323–324 (arguing, with characteristic prescience, a similar point prior to the codification of Additional Protocol I).

62. *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942) (finding in international laws of war support for the concept of unlawful combatancy); Military Commissions Act of 2009, 10 U.S.C. § 950t(15) (2009) (defining, for purposes of U.S. military commissions, the crime of murder in violation of the law of war, including the otherwise lawful killing of a “privileged belligerent”).

63. See George J. Andreopoulos, *The Age of National Liberation Movements*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 191 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994). Andreopoulos observes, “The overt politicization of the symbols of recognition, whether dealing with rebellion, insurgency, or belligerency, led to the disappearance of the concern with correlating status with facts. . . .” *Id.* at 193.

64. On June 6, 1977, the fifty-second plenary meeting of States rejected a committee proposal to include reference to, and definitions of, military objectives into what became Article 13 of Protocol II. IV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974–1977, at 71 (1978). Consequently, Additional Protocol II includes no provision on military objective.

65. See, e.g., II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 9–15 (William S. Hein & Co. 2004) (1949) [hereinafter 1949 GENEVA CONFERENCE FINAL RECORD]; VII OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974–1977, at 60–65 (1978) (summarizing States’ divergent views on the scope of draft Protocol II expressed in Plenary Session).

66. II-B 1949 GENEVA CONFERENCE FINAL RECORD, *supra* note 65, at 129.

67. CULLEN, *supra* note 2, at 41–42.

68. *Id.* at 98, 101.

69. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 39, at 1350 (noting that the material application of Protocol II does not affect that of Common Article 3). The Protocol’s requirement that opposition groups control territory and its exclusion of conflicts solely between such groups excludes armed conflicts that Common Article 3 would cover. Additional Protocol II, *supra* note 17, art. 1.

70. At the diplomatic conference that produced the Additional Protocols, Norway failed in its attempt to persuade States to drop the distinction between IAC and NIAC. See Hans Peter Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 31 AMERICAN UNIVERSITY LAW REVIEW 911, 912 (1982) (citing 5 DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, OFFICIAL RECORDS, SUMMARY RECORD 91–99 CDDH/SR.10 (1978)).

71. See discussion supported by notes 49–52.

72. HEADQUARTERS, DEPARTMENT OF THE ARMY & HEADQUARTERS, MARINE CORPS COMBAT DEVELOPMENT COMMAND, FM 3-24/MCWP 3-33.5, COUNTERINSURGENCY ¶ 1-2 (2006). The Field Manual notes, “Counterinsurgency is military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency” (citing Joint Chiefs of Staff, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms 82 (Aug. 15, 2011)) (emphasis in original).

73. See Nicholas Schmidle, *Getting Bin Laden*, NEWYORKER.COM (Aug. 8, 2011), http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle?currentPage=all.

74. See *id.*

75. CIA Chief Panetta: Obama Made “Gutsy” Decision on Bin Laden Raid, PBS NEWSHOUR, May 3, 2011, http://www.pbs.org/newshour/bb/terrorism/jan-june11/panetta_05-03.html.

76. *Id.*

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77. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (holding that U.S. operations against al-Qaeda constituted NIAC for purposes of application of Common Article 3 of the 1949 Geneva Conventions).

78. Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, NEW YORK TIMES, Aug. 12, 2011, at A1, available at http://www.nytimes.com/2011/08/12/world/asia/12drones.html?_r=1&pagewanted=print (relating U.S. rebuttals to allegations of widespread civilian casualties in CIA drone strikes in Pakistan); Charli Carpenter & Lina Shaikhouni, *Don't Fear the Reaper*, FOREIGN POLICY (June 7, 2011), http://www.foreignpolicy.com/articles/2011/06/07/dont_fear_the_reaper (noting that a CIA-led drone attack in Pakistan “arguably violates the rules on lawful combat in the Geneva Conventions”).

79. Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004–2010*, NEW AMERICA FOUNDATION (Feb. 24, 2010), <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf>.

80. See Schmidle, *supra* note 73 (relating President Barack Obama’s expansion of the CIA’s classified drone program); Charlie Savage, *U.N. Official Set to Ask U.S. to End C.I.A. Drone Strikes*, NYTIMES.COM (May 27, 2010), <http://www.nytimes.com/2010/05/28/world/asia/28drones.html>.

81. J.R. Wilson, *UAVs: A Worldwide Roundup, More and More Countries Are Developing or Cooperating on UAVs as Their Numbers and Versatility Grow*, AEROSPACE AMERICA (June 2003), available at <http://www.aiaa.org/aerospace/Article.cfm?issuetocid=365>. Israel used UAVs in the 2006 conflict in Lebanon. See Larry Dickerson, *New Respect for UAVs*, AVIATION WEEK & SPACE TECHNOLOGY, Jan. 26, 2009, at 94. UAVs were also used in 2008 between Russia and Georgia in the South Ossetia region. *Id.*

82. See Amitai Etzioni, *Unmanned Aircraft Systems: The Moral and Legal Case*, JOINT FORCE QUARTERLY, May 2010, at 66, available at <http://www.ndu.edu/press/lib/images/jfq-57/etzioni.pdf>; Kenneth Anderson, *Predators over Pakistan*, THE WEEKLY STANDARD, Mar. 8, 2010, at 24 (defending the Obama administration’s global use of CIA and military drone strikes against terrorists); Mary Ellen O’Connell, *Flying Blind: U.S. Combat Drones Operate Outside International Law*, AMERICA (Mar. 15, 2010), http://www.americamagazine.org/content/article.cfm?article_id=12179.

83. See Savage, *supra* note 80 (noting that Philip Alston as United Nations author of a report on U.S. drone practices agreed that it is “not per se illegal” for CIA operatives to fire drone missiles); Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶ 70–71, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), available at www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (noting illegality of civilian participation in hostilities is not addressed by IHL, merely consequences for purposes of targeting and lack of immunity). Matt Cover, *House Committee Questions Legality of Drone Strikes against Terrorists*, CNS NEWS (Apr. 28, 2010), <http://www.cnsnews.com/node/64916> (featuring statements by Professor O’Connell that a drone strike is only legal when used by military personnel in a combat situation where there is an ongoing armed conflict in which the United States is engaged and Professor Glazier, in contrast, stating that the “United States was engaged in an armed conflict with al Qaeda terrorists around the world” and “international legal principles . . . justified the use of drones to kill terrorists in Afghanistan, Iraq and beyond”).

84. DEPARTMENT OF THE ARMY, FM 3-07, STABILITY OPERATIONS ¶¶ 1-11–1-13 (2008) [hereinafter FM 3-07 STABILITY OPERATIONS].

85. General Charles Krulak coined the term “three-block war” to describe complex conflicts calling on armed forces to perform a range of missions simultaneously. General Charles C. Krulak,

The Strategic Corporal: Leadership in the Three Block War, MARINES MAGAZINE, Jan. 1999, at 28. Krulak imagined soldiers in a single urban area engaged in high-intensity combat on one block, conducting humanitarian operations on the next, and separating warring factions on a third. *Id.*

86. Department of Defense, DoD Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations (2005).

87. *Id.*

88. FM 3-07 STABILITY OPERATIONS, *supra* note 84, app. A.

89. See NATHAN HODGE, ARMED HUMANITARIANS (2011) (describing recent U.S. experience with nation-building and challenges faced by military leaders adapting to the new mission set).

90. DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE STRATEGY FOR OPERATING IN CYBERSPACE 5 (2011). The *Strategy* identifies “treat[ing] cyberspace as an operational domain to organize, train, and equip so that DoD can take full advantage of cyberspace’s potential.” *Id.* See also DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 37 (2010) (which observes, “Although it is a man-made domain, cyberspace is now as relevant a domain for DoD activities as the naturally occurring domains of land, sea, air, and space”); SECRETARY OF STATE FOR THE HOME DEPARTMENT, CONTEST: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM 41 (2011) (predicting increases in terrorists’ use of cyber attack and directing counterterrorism assets to integrate responses into planning).

91. The extent and nature of civilian participation in cyber operations, including attack, are difficult to discern. States guard their cyber practices and capabilities closely. Some reliable indications exist, however, that support the conclusion that the United States uses civilians in aspects of cyber operations approaching or even constituting attack. See Watts, *supra* note 50, at 407–10 (concluding from public statements and executive branch budget requests that civilians likely play significant roles in U.S. cyber operations).

92. See Hadeel al-Shalchi & Ryan Lucas, *Qaddafi Defiant in the Face of Allied Strikes*, THE CHRISTIAN SCIENCE MONITOR (Mar. 19, 2011), <http://www.csmonitor.com/World/Middle-East/2011/0319/Qaddafi-defiant-in-the-face-of-allied-strikes>; Hadeel al-Shalchi & Ryan Lucas, *Allies Pound Libya*, CHICAGO SUN-TIMES, Mar. 20, 2011, at 3 (relating British, French and U.S. strikes against government forces in Libya).

93. Authors have written on the topic of conflict characterization and conflict parsing in particular. See Carina Bergal, *The Mexican Drug War: The Case for Non-International Armed Conflict Classification*, 34 FORDHAM INTERNATIONAL LAW JOURNAL 1042 (2011); Corn & Jensen, *supra* note 2.

94. See Paul Schemm & Zeina Karam, *Gadhafi Drives Rebels from One of Last Strongholds*, CHICAGO SUN-TIMES, Mar. 14, 2011, at 16; Donald Macintyre, *Gaddafi’s Iron Fist Won’t Help Him Keep a Grip on a Divided Nation*, THE INDEPENDENT, Mar. 12, 2011, at 24; Paul Schemm & Maggie Michael, *Gadhafi Escalates War on Rebels*, CHICAGO SUN-TIMES, Mar. 7, 2011, at 4; David D. Kirkpatrick & Kareem Fahim, *Khadafy Forces Hit Key City, Lose Port; Residents Describe Massacre by Army*, BOSTON GLOBE, Mar. 6, 2011, at 1; Leila Fadel & Anthony Faiola, *Khadafy’s Forces Assault Rebels, Protestors*, BOSTON GLOBE, Mar. 5, 2011, at 3 (reporting firing on demonstrators); Jason Koutsoukis, *Gaddafi’s Forces Unleashed on Rebels*, SYDNEY MORNING HERALD, Mar. 3, 2011, at 1 (reporting alleged government use of mercenaries); Maggie Michael & Paul Schemm, *Gadhafi Forces Strike Back*, CHICAGO SUN-TIMES, Feb. 25, 2011, at 25.

95. Michael N. Schmitt, *Wings Over Libya: The No-Fly Zone in Legal Perspective*, 36 YALE INTERNATIONAL LAW JOURNAL ONLINE 45 (2011), available at <http://www.yjil.org/online/volume-36-spring-2011/wings-over-libya-the-no-fly-zone-in-legal-perspective>; Michael W. Lewis,

How Should the Conflict in Libya Be Categorized?, OPINIO JURIS (Mar. 30, 2011), <http://opiniojuris.org/2011/03/30/how-should-the-conflict-in-libya-be-categorized/>; Kenneth Anderson, *Humanitarian Intervention in Libya*, OPINIO JURIS (Mar. 7, 2011), <http://opiniojuris.org/2011/03/07/humanitarian-intervention-in-libya-follow-up-post/>; Patrick O'Donnell, *Humanitarian (i.e., military and/or otherwise) Intervention in Libya?*, RATIO JURIS (Feb. 24, 2011), <http://ratiojuris.blogspot.com/2011/02/humanitarian-ie-military-and-otherwise.html> (summarizing early blog posts concerning the Libyan situation).

96. See Tamas Hoffman, *Squaring the Circle? – International Humanitarian Law and Transnational Armed Conflicts*, in RULES AND INSTITUTIONS OF INTERNATIONAL HUMANITARIAN LAW PUT TO THE TEST OF RECENT ARMED CONFLICTS 217 (Michael J. Matheson & Djamchid Momtaz eds., 2010); Geoffrey S. Corn, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 46 (2009); Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 95 (2009); Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series No. 6 (Winter 2006), available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> (expressing skepticism at the application of the law of war to what are in the author's opinion legally novel groups).

97. See U.N. Charter art. 2(7). Part of the Charter's international security regime, Article 2(7) states, “Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .” *Id.*

98. The term “networked cyber attack” is intended to distinguish attacks using the Internet or other electronic communications as a means of delivery of malware from attacks delivered manually or from the physical location of the target computer. The latter would be quite possible to conduct within the territorial boundaries of a single State—for instance, as part of a NIAC.

99. Charles Clover, *Kremlin-backed Group Behind Estonia Cyber Blitz*, FINANCIAL TIMES (Mar. 11, 2009), <http://www.ft.com/cms/s/0/57536d5a-0ddc-11de-8ea3-0000779fd2ac.html>.

100. See Alan Travis, *Counter-Terrorism Strategy Driven by “Cyberjihad” Threat*, THE GUARDIAN (London), July 12, 2011, available at <http://www.guardian.co.uk/politics/2011/jul/12/counter-terrorism-strategy-cyberjihad-threat/print?mobile-redirect=false>.

101. See Rain Ottis, *From Pitchforks to Laptops: Volunteers in Cyber Conflicts*, in CONFERENCE ON CYBER CONFLICT, PROCEEDINGS 2010, at 97 (Christian Czosseck & Karlis Podins eds., 2010); TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBER-ATTACK CAPABILITIES 2-2 (William A. Owens, Kenneth W. Dam & Herbert S. Lin eds., 2009).

102. Resort to the object and purpose of international law norms is widely accepted as a means of resolving ambiguity, particularly among continental European international lawyers and jurists. The term appears in the widely ratified Convention on Treaties. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

103. See INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR HANDBOOK 166 (2004).

104. A.P.V. ROGERS, LAW OF THE BATTLEFIELD 7 (1996).

105. W. Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 4 (1990).

106. Lieber Code, *supra* note 5, art. 22. The nearly contemporaneous St. Petersburg Declaration of 1868 stated similarly, “[T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.” Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297, reprinted in Schindler & Toman, *supra* note 5, at 91, 92.

107. “In order to ensure respect and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Additional Protocol I, *supra* note 4, art. 48.

108. Protocol I employs two prongs in the targeting aspect of distinction. First, combatants must direct their weapons only against specific military objectives. *Id.*, arts. 51(4)(a), 52(2). Second, targeting distinction requires that combatants not employ weapons that are inherently incapable of distinguishing between enemy combatants and civilians. *Id.*, art. 51(4)(b).

109. *See id.*, arts. 51(3) and 52.

110. *Id.*, art. 51(4).

111. *Id.*, art. 44(3).

112. *Id.*

113. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 39, ¶ 1684. The *Commentary* notes that fifty speakers addressed Article 44 in debate and introduced thirteen amendments to the original proposal. *Id.* The United States does not consider Article 44(3) reflective of customary international law and specifically objects to it. *See* Matheson, *supra* note 40, at 419.

114. Additional Protocol I, *supra* note 4, art. 58.

115. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 39, ¶ 2244.

116. *See* Parks, *supra* note 105, at 112. Parks observes,

Any claim of “humanitarian gain” is offset by the fact that the provisions contained in Protocol I shift the responsibility for the protection of the civilian population away from the host nation (which has custody over its civilian population, and which traditionally has borne the principal responsibility for the safety of the civilian population) almost exclusively onto an attacker.

Id.

117. *Id.*

118. States did not fully incorporate the Additional Protocol I expressions of distinction into the NIAC targeting provisions of Additional Protocol II. Protocol II protects the civilian population from “the dangers arising from military operations.” Additional Protocol II, *supra* note 17, art. 13(1). The same article observes, “The civilian population as such, as well as individual civilians, shall not be the object of attack.” *Id.*, art. 13(2). The article forbids attacks intended to terrorize the civilian population. *Id.* And finally, Additional Protocol II reproduces the Protocol I rule protecting civilians from intentional targeting “unless and for such time as they take a direct part in hostilities.” *Id.*, art. 13(3). An influential manual on the law of armed conflict applicable to NIAC concludes, “Today, it is indisputable that the principle of distinction is customary international law for both international and non-international armed conflict.” NIAC MANUAL, *supra* note 32, ¶ 1.2.2. Similarly, an ICRC-sponsored study of customary international law concludes distinction is a norm of customary international law in both IAC and NIAC. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 32, at 3.

119. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 22, Mar. 26, 1999, 2253 U.N.T.S. 212 [hereinafter 1999 Second Protocol to 1954 Hague Convention]. The base 1954 Hague Convention applies to international armed conflict and occupation. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 18, May 14, 1954, 249 U.N.T.S. 240. The 1999 Second Protocol expands application to “conflict not of an international character, occurring within the territory of one of the Parties.” 1999 Second Protocol to 1954 Hague Convention, *supra*, art. 22.

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120. Conventional Weapons Convention, *supra* note 10. In 2001, States parties amended the scope of material application of the Convention. Previously the Convention only applied to international armed conflict. Currently the scope of application reads:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.
4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.
6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.
7. The provisions of Paragraphs 2–6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article.

Id., art. 1.

121. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. I.1(a), Sept. 18, 1997, 2056 U.N.T.S. 211.

122. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I.1(b), Jan. 13, 1993, 1974 U.N.T.S. 45.

123. Convention on Cluster Munitions art. 1, May 30, 2008, 48 INTERNATIONAL LEGAL MATERIALS 357 (2008) (stating, “Each State Party undertakes never under any circumstances to use cluster munitions”).

124. Rome Statute, *supra* note 48, art. 8(2)(c)–(f).

125. The criteria here referenced are derived from the Third Geneva Convention, Article 4, and are supposed by many to constitute criteria for privileged participation in hostilities. They include belonging to a party, being commanded by a person responsible for his subordinates, having a fixed distinctive sign, carrying arms openly and conducting operations in accordance with the law of war. 1949 Geneva Convention III, *supra* note 3, art. 4.

126. EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 68 (2010).

127. Private security contractors may have been, however, intermingled with the civilian population inconsistent with the object of Additional Protocol I, Article 58 or a customary rule to similar effect.

128. WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 2 (2008).

129. See Statute of the International Criminal Tribunal for the former Yugoslavia art. 3, amended Sept. 2009, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (criminalizing violations of the customs of war, including those applicable in NIAC); Statute of the International Criminal Tribunal for Rwanda art. 4, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (criminalizing violations of Common Article 3 of the 1949 Geneva Conventions and Protocol II).

130. Rome Statute, *supra* note 48, art. 17(1)(a).

131. *Prosecutor v. Tadić*, *supra* note 12, ¶ 97.

132. 1949 Geneva Convention III, *supra* note 3, art. 130.

133. 1949 Geneva Convention IV, *supra* note 3, art. 147.

134. CULLEN, *supra* note 2, at 56 (quoting Eldon Van C. Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARVARD INTERNATIONAL LAW JOURNAL 37, 70–71 (1970)). In full, Greenberg's maxim addresses "revolutionary war." *Id.*

135. See, e.g., *Prosecutor v. Tadić*, *supra* note 12, ¶¶ 97–98 (observing the distinction between law of IAC and that of NIAC as irrelevant).

136. The International Committee of the Red Cross prepared the first draft of what would become the 1949 Geneva Conventions. The most ambitious passage of the draft would have applied the Conventions to all conflicts. Article 2 of the Stockholm Draft would have made the Conventions applicable in their entirety not only to armed conflict and belligerent occupation between States parties, but also to "armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties." Draft Convention for the Protection of Civilian Persons in Time of War, 1949, reprinted in I 1949 GENEVA CONFERENCE FINAL RECORD, *supra* note 65, at 113. States rejected the proposal. II-B 1949 GENEVA CONFERENCE FINAL RECORD, *supra*, at 41–43. Among other conceptual concerns, States noted that applying the Civilians Convention to insurgents would be problematic because the Convention relied on enemy nationality to define the civilian protected-person class. *Id.* at 41.

137. See DOCUMENTS ON THE LAWS OF WAR 9 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (citing Ministère des Affaires Étrangères, Report of the Second Subcommission in the official report, *Conférence Internationale de la Paix, La Haye, 18 Mai–29 Juillet 1899*, at 49–51 (Imprimerie Nationale, The Hague, 1899); WILLIAM I. HULL, THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW 215–20 (1908)).

138. See CRAWFORD, *supra* note 126, at 29.

139. The references to "international law," to "the law of nations" and to "established custom" appear, respectively, in the Hague and Additional Protocol I versions of the Martens clause. 1899 Hague Convention II, *supra* note 30, pmbl.; 1907 Hague Convention IV, *supra* note 24, pmbl.; Additional Protocol I, *supra* note 4, art. 1(2).

140. The reference to "usages established among civilized peoples" appears in the 1899/1907 Hague expression of the clause, as well as the 1949 Geneva Convention expression. 1899 Hague Convention II, *supra* note 30, pmbl.; 1907 Hague Convention IV, *supra* note 24, pmbl.; 1949 Geneva Convention IV, *supra* note 3, art. 158.

141. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 620 (1982).

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142. See NIAC MANUAL, *supra* note 32; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 32; Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHICAGO JOURNAL OF INTERNATIONAL LAW 685 (2012).

143. See DINSTEIN, *supra* note 19, at 13, 16–20.

144. Describing British efforts to defeat Germany in North Africa, Winston Churchill is credited with the phrase, “Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.” The Churchill Society, <http://www.churchill-society-london.org.uk/EndoBegn.html> (quoting Winston Churchill, *The End of the Beginning*, The Lord Mayor’s Luncheon, Mansion House (Nov. 10, 1942)).

145. Anthea Roberts & Sandesh Sivakumaran, *Hybrid Sources of Law: Armed Groups and the Creation of International Law*, 37 YALE JOURNAL OF INTERNATIONAL LAW 107 (2011).

146. See Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in THE HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002); Michael W. Doyle & Geoffrey S. Carlson, *Silence of the Laws? Conceptions of International Relations and International Law in Hobbes, Kant, and Locke*, 46 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 648 (2008); Eric A. Posner & Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility under International Law*, 9 AMERICAN LAW & ECONOMICS REVIEW 72 (2007).